IN THE SUPREME COURT OF THE STATE OF MISSOURI

In the Interest of R. B.,	)	Appeal No. SC86979

APPELLANT'S REPLY BRIEF

Dated January 20, 2006

John J. Smith #40977
1700 South River Road
Saint Charles, Missouri 63303
(636) 949-3040
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

The Jurisdictional Statement from Appellant's Amended brief is incorporated herein by reference.

STATEMENT OF FACTS

The Statement of Facts set forth in Appellant's Amended brief is incorporated herein by reference

POINTS RELIED ON

I. The Appellant has specific statutory authority to appeal pursuant to Section 211.261.2 RSMo and Double Jeopardy does not bar this appeal

State v. Eisenhouer, 40 S.W.3d 916 (Mo. 2001)

Section 211.261 RSMo

II. **Appellant's Points Relied On are in substantial conformity with Rule 84.04, they are sufficiently specific to ensure that the reviewing court does not act as an advocate for the party by speculating on facts and arguments that were not asserted and further, this case involves the welfare of children where a more tolerant application of the requirements of Rule 84.04 is permitted.**

Reynolds v. Reynolds, 163 S.W.3d 567 (Mo. Ct. App. 2005)

J A.D. v. F.J.D., 978 S.W.2d 336 (Mo. 1998)

Rule 84.04

III. Respondent fails to address the issue of application of the *Ward* test to the Juvenile Code, the issue of whether or not the Child Advocacy Center Videotape is "testimonial" was not addressed in the trial court's ruling and the out of state cases cited by Respondent are

inapplicable in that none of them address application of the *Ward* test to the statutory scheme of Juvenile Justice.

United States v. Ward, 448 U.S. 248 (U.S. 1980)

Hudson v. United States, 522 U.S. 93, (U.S. 1997)

In the Interest of RLC, 967 S.W.2d 674, (Mo. Ct. App. 1998)

McKeiver v. Pennsylvania, 403 U.S. 528, (U.S., 1971)

ARGUMENT

I. The Appellant has specific statutory authority to appeal pursuant to Section 211.261.2 RSMo and Double Jeopardy does not bar this appeal[1]

Respondent argues that the Juvenile Officer does not have standing to appeal under Section 211.261 RSMo. However, under Section 211.261.2 RSMo. the Juvenile Officer is given a specific and unequivocal right to appeal "any order suppressing evidence…in proceedings under subdivision (3) of subsection 1 of Section 211.031." This case involves a proceeding under that subdivision.

Respondent argues that the trial court's holding that the evidence not considered therein was "excluded" not "suppressed" and therefore 211.261.2

---

[1] Appellant has filed a Response and Suggestions in Opposition to Respondent's Motion to Dismiss the Appeal. Points I and II are directed to that motion. Appellant has requested that Respondent's Motion be determined prior to oral argument. However, in the event that such motion is taken with the case, Appellant has included his Argument in defense of such motion herein.

is inapplicable. Suppression is a term used when dealing with evidence that is not objectionable as violating any rule of evidence but admission of which would illegally violate a substantive right of the accused. Exclusion of evidence, on the other hand, is merely based upon the application of a rule of evidence that makes such evidence inadmissible. ***State v. Eisenhouer***, 40 S.W.3d 916, 918-919 (Mo. 2001). In the present case the evidence was ruled inadmissible as a violation of a substantive right of the accused, i.e. violation of his Sixth Amendment right to confrontation. There was no evidentiary objection offered or trial court ruling made that demonstrates that the evidence was ruled inadmissible through the application of a rule of evidence. The only ground offered or decided for its inadmissibility was as a substantive violation of the right to confrontation.

Respondent also asserts that this appeal is prohibited by application of Double Jeopardy. Without conceding the applicability of any constitutional right to juvenile delinquency proceedings, even assuming that Double Jeopardy is applicable to juvenile delinquency cases, Double Jeopardy does not prevent this appeal.

This appeal is in the nature of an interlocutory appeal of suppressed evidence. The fact that the trial court made its suppression ruling in the same order that dismissed the petition does not change the status of this appeal.

The reason that the petition was dismissed is that the trial court did not consider all of the evidence that was admitted, i.e. it suppressed the videotape. Since the Juvenile Officer is allowed an appeal to challenge the trial court's suppression of evidence and that appeal has been timely initiated, there has not been an "acquittal" as stated by Respondent. The matter is still pending until such time as this Court determines this appeal. Double Jeopardy does not prevent this appeal.

II. Appellant's Points Relied On are in substantial conformity with Rule 84.04, they are sufficiently specific to ensure that the reviewing court does not act as an advocate for the party by speculating on facts and arguments that were not asserted and further, this case involves the welfare of children where a more tolerant application of the requirements of Rule 84.04 is permitted.

Respondent argues that Appellant's Brief fails to meet the requirements of Rule 84.04 and that therefore this Court lacks jurisdiction. While Respondent cites several cases that state the requirements of Rule 84.04 are mandatory, there are no cases cited that make technical and absolute compliance a jurisdictional prerequisite. This Court is vested with subject

matter jurisdiction as set forth in Appellant's Jurisdictional Statement not through the Points Relied On section of the brief.

Respondent further argues that Appellant's second through fourth Points do not specifically state the ruling of the trial court being challenged and do not state the "wherein and why" the trial Court erred. However, Points II and IV specifically state that the trial Court erred in suppressing evidence and state the reason why such error is claimed. That leaves only Point III. While technically correct in that the words "The trial court erred in suppressing the evidence" do not appear in the language of that point, it is respectfully submitted that such point is in fact in "substantial compliance" with Rule 84.04 and that the Rule's purpose of "ensuring that the reviewing court does not act as an advocate for the party by speculating on facts and arguments that were not asserted." ***Reynolds v. Reynolds***, 163 S.W.3d 567, 568-569 (Mo. Ct. App. 2005) is fully protected. Additionally, it is this Court's policy "to decide a case on its merits rather than on technical deficiencies in the brief. Generally, this Court will not exercise discretion to disregard a defective point unless the deficiency impeded disposition on the merits. A brief impedes disposition on the merits where it is so deficient that it fails to give notice to this Court and to the other parties as to the issue presented on appeal." ***J A.D. v. F.J.D***., 978 S.W.2d 336, 338 (Mo. 1998).

This is a case involving the validity of statutes, determinations of the correct analysis of a statutory scheme, constitutional protections and compelling state interests, all of which arise out of the case of ***Crawford v. Washington*** 24 S. Ct 1354 (2004). It is difficult to perceive how the failure to include the words "The trial court erred in suppressing the evidence" in a point that identifies that decision is so deficient that it impedes disposition on these meritorious and important issues. Additionally, "appellate courts are more tolerant regarding the requirements of Rule 84.04(d) when the appeal involves the welfare of children" ***Windsor v. Windsor,*** 166 S.W.3d 623, 629 (Mo. Ct. App. 2005). It is respectfully submitted that the determination of the issues presented in this appeal may have significant impact upon the entire Juvenile Code, a statutory scheme dealing solely with the welfare of children and that any errors in format of the Points Relied On are *de minimus*.

III. Respondent fails to address the issue of application of the Ward test to the Juvenile Code, the issue of whether or not the Child Advocacy Center Videotape is "testimonial" was not addressed in the trial court's ruling and the out of state cases cited by Respondent are inapplicable in that none of them address application of the Ward test to the statutory scheme of Juvenile Justice legislation.

Respondent's argument presupposes that nothing has changed since the enactment of the Bill of Rights in 1791 or the later decision of the U.S. Supreme Court of ***In Re Gault***, 387 U.S. 1; 87 S. Ct. 1428; 18 L. Ed. 2d 527; 1967 U.S (1967). In fact, Respondent correctly notes that "[a]t the time of the enactment of the Bill of Rights, there was no Juvenile Court" and "the common law did not differentiate between adults and children charged with crime." Respondent's Brief pg. 25. Thus, Respondent asserts, the Sixth Amendment must apply to juvenile delinquency proceedings.

The Court in ***Crawford v. Washington,*** 124 S. Ct 1354 (2004) reasoned that ascertainment of the intent of the Founders at the time of the enactment of the Bill of Rights in 1791 is the only appropriate method to make determinations of cases that implicate the Bill of Rights. If this reasoning is carried to its logical conclusion, then all legislative schemes that

treat juvenile delinquency differently than adult crimes are *ipso facto* unconstitutional as the Framers would not have intended to treat children differently from adults in such circumstances. This result is obviously not the current state of the law. "…[T]he juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label. *Kent, 383 U.S., at 554; Gault, 387 U.S., at 17, 49-50; Winship, 397 U.S., at 365-366.*" ***McKeiver v. Pennsylvania***, 403 U.S. 528, 541 (U.S., 1971). "Before *Gault* was decided in 1967, the Fifth Amendment's guarantee against self-incrimination had been imposed upon the state criminal trial. *Malloy v. Hogan, 378 U.S. 1 (1964).* So, too, had the Sixth Amendment's rights of confrontation and cross-examination. *Pointer v. Texas, 380 U.S. 400 (1965),* and *Douglas v. Alabama, 380 U.S. 415 (1965).* Yet the Court did not automatically and peremptorily apply those rights to the juvenile proceeding. A reading of *Gault* reveals the opposite." **Id.**

The fact of the matter is that subsequent to the decision in ***Gault*** the U.S. Supreme Court laid out a method of analysis to determine whether or not a particular legislative scheme is civil or criminal for the purposes of the constitutional protections required to be afforded to persons affected by

those schemes. That method of analysis is the **Ward** test set forth in Appellant's Amended Brief.

Respondent argues that "commitment is commitment" (Respondent's Brief 26) and that incarceration is incarceration regardless of the purposes of incarceration, citing ***Breed v. Jones*** 421 U.S. 530 n12 (1975). However one year later the U.S. Supreme Court held that "loss of liberty does not ipso facto mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment." ***Middendorf v. Henry***, 425 U.S. 25, 37 (U.S. 1976) It is important to note that ***Breed*** was decided before the cases of ***United States v. Ward***, 448 U.S. 248 (U.S. 1980) and ***Hudson v. United States***, 522 U.S. 93, (U.S. 1997) which dictate the appropriate method of analysis.

Respondent attempts to distinguish ***In the Interest of RLC,*** 967 S.W.2d 674, 677 (Mo. Ct. App. 1998) by making a distinction between "post-adjudication commitment to DYS, rather that the adjudication phase of the commitment." (Respondent's Brief, 27). However, the basis for the application of the right to confrontation in all of the cases cited by Respondent arises from ***Gault's*** holding that the potential loss of liberty by a commitment to a state institution is the equivalent to "incarceration against one's will, whether it is called 'criminal' or 'civil.' In re Gault, supra, at 50." ***Breed v. Jones***, 421 U.S. 519, 530 (U.S. 1975). This potential loss of liberty

arises when a juvenile comes before a court in proceedings under the Juvenile Code. However, loss of liberty is no longer the test to determine whether a statutory scheme is civil or criminal. *See* ***Ward*** and ***Hudson,*** supra.

The cases cited by Respondent from other states do not apply the ***Ward*** analysis to their own particular statutory scheme of juvenile justice. All of those Courts assume that the right to confrontation applies via ***Gault*** or some specific state statute or state court ruling that affords that right.

Respondent argues that the forensic interview is 'testimonial' as defined under ***Crawford.*** However, the trial court did not make such a finding nor was there any argument made or objection raised regarding such a finding. The issue has not been raised by Appellant and it is not currently before this Court. The issue presented is whether the Juvenile Code is a civil or criminal statutory scheme, utilizing the analysis mandated by the U.S. Supreme Court. If the Court finds that the Juvenile Code is criminal in nature, the Court can remand for further findings as to whether or not the interview is 'testimonial', a term specifically left undefined by the ***Crawford*** court. "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' " ***Crawford v. Washington***, 541 U.S. 36, 68 (U.S. 2004). If the Court finds that the statutory scheme is civil, then ***Crawford***

does not automatically apply and the Court may make such evidentiary rulings on the admissibility of the suppressed evidence as it deems appropriate.

Respondent further argues that Sections 491.075 and 492.304 RSMo. are unconstitutional pursuant to ***Crawford***. However, the issue presented here only deals with the Juvenile Code, not the Criminal Code. It may well be that these sections may no longer be used in criminal trials. Even if such an eventuality comes to pass, that does not automatically preclude their use in juvenile proceedings. If the Court finds that the statutory scheme of the Juvenile Code is civil in nature, the use of the evidentiary rules legislatively established in those sections may well be available in proceedings under the Juvenile Code.

Respondent argues that the trial court had the authority to "change its mind" regarding the admissibility of the forensic interview. Appellant does not dispute that the trial court has discretionary authority over evidentiary rulings. However, where, as here, there may be an abuse of that discretion to the extent that it produces a fundamentally unfair result, the trial court exceeds its authority.

Finally, Respondent claims that Appellant has not cited any authority for the proposition. That is incorrect as Appellant has cited Black's Law

Dictionary as authority. While such authority is a secondary source, it still is authority.

CONCLUSION

"If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." ***McKeiver v. Pennsylvania***, 403 U.S. 528, 551 (U.S. 1971). It is respectfully suggested that there is a substantial difference between criminal and juvenile proceedings. The legislative scheme of the Juvenile Code is civil in nature as application of the ***Ward*** analysis clearly demonstrates. As a result, imposition of the ***Crawford*** rule to juvenile proceedings is not required. A juvenile's rights may be adequately protected by competent judicial officers using their training and authority to decide questions regarding the admission of relevant, material, probative and competent evidence, evidence that has been allowed for decades. There are sufficient procedural and substantive due process safeguards throughout the Juvenile Code and Rules to insure that juveniles come before a court that is not a "kangaroo court" or "Star Chamber" but rather a specialized court solely concerned with the treatment and rehabilitation of juveniles. Appellant is not arguing that the Court disregard the Supreme Court's

Crawford decision. It may well be that ***Crawford*** applies to criminal proceedings. However, there is a statutory judicial process to determine under which system a juvenile belongs. The determination of "whether the child is a proper subject to be dealt with under the provisions of [the Juvenile Code] and whether there are reasonable prospects of rehabilitation within the juvenile justice system." (Section 211.071.6 RSMo.) clearly distinguishes the status of the criminal and juvenile justice systems. The former is for punishment, the latter is for treatment.

Wherefore, Appellant respectfully requests that this Court apply the ***Ward*** analysis to determine the status of the Juvenile Code as a civil statutory scheme. It is further respectfully requested that this Court find that the statutory evidentiary procedures embodied in Section 491.075 and 492.304 RSMo survive the ***Crawford*** decision as applied to proceedings under the Juvenile Code and are appropriate for use in cases involving child physical and sexual abuse under the Juvenile Code. It is further respectfully requested that this Court vacate the Findings and Recommendation Denying Jurisdiction and remand the cause to the trial court with instructions to consider the suppressed evidence and enter Findings and Recommendations after consideration of all of the evidence presented at trial and for such further or other relief as the Court deems just and proper.

Respectfully submitted,

John J. Smith #40977
1700 South River Road
Saint Charles, Missouri
63303
(636) 949-3040
Attorney for Appellant

CERTIFICATE OF SERVICE

I, John J. Smith, attorney for Appellant certify that the above was served on Benicia Baker-Livosi, Attorney for the juvenile, 6 Westbury Drive, St. Charles, Mo 63301 and Timothy C. Mooney, Jr., Attorney for Justice for Children, Amicus, One Metropolitan Square, Suite 3600, Saint Louis MO 63102, on January 20, 2006 by ordinary mail.

_____

John J. Smith #40977

CERTIFICATION PURSUANT TO RULE 84.06(C)

I, John J. Smith, Legal Counsel for the Juvenile Officer of Saint Charles County do hereby certify that this brief complies with Rule 84.06 of the Rule of Civil Procedure and that this brief contains 3298 words. I further certify that a floppy disk containing this brief in Microsoft Word XP format was served along with this brief and that said floppy disk was virus scanned using eTrust InoculateIT version 7.1.501 and was reported by said program to be virus free.

Dated: January 18, 2006

John J. Smith #40977
1700 South River Road
Saint Charles, Missouri 63303
(636) 949-3040
Attorney for Juvenile Officer